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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE**

FAYE IRENE GUENTHER, an
individual,

Plaintiff,

v.

JOSEPH H. EMMONS, individually,
and OSPREY FIELD CONSULTING
LLC, a limited liability company,

Defendants.

No. 2:22-cv-00272-TOR

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR
FEES AND COSTS**

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INTRODUCTION

By filing Plaintiff Faye Guenther’s settlement offer and their response in court before judgment (ECF No. 48-24, 48-25), Defendants Joseph Emmons and Osprey Field Services LLC (collectively, Emmons) violated the state statute under which they seek fees and are barred from obtaining any award under that statute. *Hanson v. Estell*, 100 Wn. App. 281, 290–91, 997 P.2d 426 (2000); *Cintas Corp. v. C.C. Cavanaugh, Inc.*, 138 Wn. App. 1012, *5 (2007) (unpublished); *Chicago Title Ins. Co. v. Pauley*, 126 Wn. App. 1040, *1–2 (2005) (unpublished).

That statute doesn’t apply in federal court anyway because, under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny, (1) taxation of costs in federal court is governed by a federal statute and RCW 4.84.250, by its terms, is a Washington statute about taxing costs; (2) even if considered a fee statute, RCW 4.84.250 is a procedural fee-shifter inapplicable in federal court; and (3) applying the state statute in federal court would administer the law inequitably because the Washington Supreme Court has held that a plaintiff has a clear right in state court to voluntarily dismiss her claims before trial without facing RCW 4.84.250 liability. The Court should therefore deny Emmons’s request for fees.

And the Court should award Emmons no more than \$18,147.39 in costs, as the remaining “costs” he seeks are not taxable under 28 U.S.C. § 1920.

BACKGROUND

I. Factual background

As the Court is familiar with this case, Guenther recounts only the background necessary to analyze this motion. In December 2021, Dan Clay, President of UFCW Local 555 in Oregon, directed Local 555’s contracted political director, Mike Selvaggio, to mail UFCW Local 21 and 1439 members in Washington a flyer. ECF No. 130 at 2–3. Clay and his colleagues did so to try to scuttle the anticipated merger of two Washington locals into Local 3000. ECF No. 104 at 5. When that mailing did not get the traction Clay sought, he and Selvaggio hired Joseph Emmons—a Portland-based political-communications consultant—to circulate the flyer in-person at grocery stores in Spokane, Washington. ECF No. 130 at 4.

The flyers accused Guenther, the then-President of Local 21 and anticipated President of Local 3000, of (1) helping the former President of Local 367 cover up sexual harassment charges and paying him off to install her “puppet,” Mike Hines, and (2) hiding Eric Renner, the then-President of Local 1439, from sexual harassment charges by landing him a job with Local 21. *Id.* These accusations against Guenther were false—a point Emmons did “not dispute” on summary judgment. *Id.* at 6–7. *See also* ECF No. 104 at 11–12; ECF No. 116, ¶¶ 9–13.

Guenther sued Emmons in Washington superior court in July 2022 for defamation and false light. ECF No. 1, Ex. A. Local 555 indemnified Emmons and has covered the fees and costs he incurred in this litigation. ECF No. 105, ¶ 94; ECF

No. 106, Ex. 21. On November 9, 2022, Emmons removed the action here based on diversity jurisdiction. ECF No. 1.

On April 30, 2024—after the defendants answered but before dispositive motions or trial—Guenther moved under Fed. R. Civ. P. 41(a)(2) to dismiss the action without prejudice. ECF No. 39. Emmons responded, in part, by filing Guenther’s February 7, 2024, settlement offer and his February 12, 2024, response. ECF No. 48-24, 48-25. By order dated June 7, 2024, the Court granted the motion in part. ECF No. 79. Namely, it dismissed the action on the condition that Defendants could seek fees under RCW 4.84.250. *Id.* at 13–14.¹ That order did not consider whether the Court had authority—consistent with *Erie* and its progeny—to apply RCW 4.84.250 in this federal diversity action or whether Emmons’s pre-judgment filing of Guenther’s offer and his own response precluded him from seeking fees.

Guenther then moved to withdraw the dismissal, ECF No. 82, which the Court granted by order dated July 8, 2024. ECF No. 88. After briefing and argument, the Court granted Emmons summary judgment on the grounds that Guenther was a limited purpose public figure who failed to prove Emmons published the flyers with actual malice. ECF No. 130.² The Court did not address the flyers’ falsity. *Id.*

¹ Emmons’ attorneys had then incurred over \$800,000 in fees. ECF No. 48, ¶ 35.

² Guenther respectfully disagrees with that ruling and has appealed. ECF No. 136.

II. Statutory background

Under the Rules Enabling Act, federal “rules of practice and procedure ... shall not abridge, enlarge or modify any substantive right,” and “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” 28 U.S.C. §§ 2072(a)–(b).

Another federal statute, 28 U.S.C. § 1920, authorizes federal courts to tax six specified costs. Unless specified in another statute, costs taxable by federal courts exclude attorneys’ fees. *See* Fed. R. Civ. P. 54(d)(1) (“Unless a federal statute, these rules, or a court order provides otherwise, costs—**other than attorney’s fees**—should be allowed to the prevailing party.”) (emphasis added); *Rimini St., Inc. v. Oracle USA, Inc.*, 586 U.S. 334, 338–41 (2019); *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 565–66 (2012) (cost statute to be narrowly construed).

As for Washington law, Title 4 of the Revised Code of Washington governs “Civil Procedure.” Within Title 4, Chapter 84 governs “Costs.” Within that chapter lies Section 250, titled “Attorneys’ fees as costs in damage actions of ten thousand dollars or less—Allowed to prevailing party.” That section provides:

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, **there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys’ fees.** After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

1 RCW 4.84.250 (emphasis added). We refer to this statute as Washington’s “small-
2 claims statute.”

3 Emmons identifies no Washington statute—and Guenther is aware of none—
4 that requires Washington courts to award attorneys’ fees to prevailing parties in
5 defamation or false light actions. (The Washington Uniform Public Expression
6 Protection Act provides fees to parties that prevail on a RCW 4.105.020 motion. *See*
7 RCW 4.105.090. Emmons did not bring such a motion and does not—and could
8 not—seek fees under RCW 4.105.090.)

9 ARGUMENT

10 **I. By filing Guenther’s settlement offer in Court before judgment, Emmons 11 barred himself from obtaining fees under the small-claims statute.**

12 RCW 4.84.250 is part of an integrated statutory scheme for awarding fees as
13 costs in damages actions of ten thousand dollars or less in Washington courts. A
14 related statute provides: “Offers of settlement shall not be filed or communicated to
15 the trier of the fact until after judgment, at which time a copy of said offer of
16 settlement shall be filed for the purposes of determining attorneys’ fees as set forth
17 in RCW 4.84.250.” RCW 4.84.280. A party who files a settlement offer or
18 communicates it to the trier of fact—here, the Court, as this case was decided on
19 summary judgment—violates RCW 4.84.280 and is “not entitled to attorney fees
20 under RCW 4.84.250.” *Hanson v. Estell*, 100 Wn. App. 281, 291, 997 P.2d 426
(2000). *Accord Cintas Corp. v. C.C. Cavanaugh, Inc.*, 138 Wn. App. 1012, *5 (2007)

(unpublished); *Chicago Title Ins. Co. v. Pauley*, 126 Wn. App. 1040, *1–2 (2005) (unpublished).

Emmons committed precisely such a violation here by filing Guenther’s settlement offer in May 2024 (ECF No. 48-24), more than six months before the Court rendered judgment in December 2024. ECF No. 130. He has thus barred himself from any fee award under the statute.

This forfeiture is alone sufficient to deny his claim for fees under RCW 4.84.250. But his petition suffers an even more fundamental defect. The small-claims statute does not apply in federal court, as we explain next.

II. This Court has no authority to award fees under Washington’s small-claims statute.

A. Federal courts sitting in diversity apply state substantive law and federal procedural law.

The Supreme Court set forth the framework for determining whether state or federal law applies in a federal diversity action most recently in Justice Stevens’s controlling opinion in *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 559 U.S. 393 (2010).³ The analysis starts with the principle that “federal courts sitting in

³ Under *Marks v. United States*, 430 U.S. 188, 193 (1977), Justice Stevens’s concurrence is controlling because it provided the narrowest ground for decision. See *Stender v. Archstone-Smith Operating Tr.*, 958 F.3d 938, 947 (10th Cir. 2020)

1 diversity ‘apply state substantive law and federal procedural law.’” *Id.* at 417
2 (Stevens, J., concurring) (quoting *Hanna v. Plumer*, 380 U.S. 460, 465 (1965)).

3 To administer that principle, federal courts first ask whether a federal
4 procedural rule governs the situation; if so, the Rules Enabling Act controls and
5 requires the court to apply the federal rule unless doing so would violate the Enabling
6 Act (by abridging, enlarging, or modifying a substantive right) or the Constitution.
7 *Id.* at 418. But if no federal rule applies, a federal court “must follow the Rules of
8 Decision Act⁴ ... and make the relatively unguided *Erie* choice ... to determine
9 whether the state law is the rule of decision.” *Id.* at 417.

10 An initial step of that inquiry is whether the federal and state rule can co-exist
11 as applied to the situation at hand. *Id.* at 421. If so, the federal court should honor
12 both. *Id.* But if they directly collide, the court must determine whether applying the
13 federal rule validly exercises rulemaking authority bestowed by the Rules Enabling
14

15 (so holding while recognizing that the D.C. Circuit has found otherwise). The Ninth
16 Circuit has not, to our knowledge, addressed which *Shady Grove* opinion controls.

17 ⁴ The Rules of Decision Act provides that the “laws of the several States, except
18 where the Constitution or treaties of the United States or Acts of Congress otherwise
19 require or provide, shall be regarded as rules of decision in civil actions in the courts
20 of the United States, in cases where they apply.” 28 U.S.C. § 1652.

1 Act, which prohibits federal rules from abridging, enlarging, or modifying any
2 substantive rights (including those provided under state law). *Id.* at 422. Finding an
3 Enabling Act problem is a high bar, cleared only where there is “little doubt” that a
4 “federal rule would alter a state-created right” *Id.* at 432. This inquiry “turns on
5 whether the state law actually is part of a State’s framework of substantive rights or
6 remedies.” *Id.* at 419.

7 The “mere fact that a state law is designated as a procedural rule suggests it
8 reflects a judgment about how state courts ought to operate and not a judgment about
9 the scope of state-created rights and remedies.” *Id.* at 432. *Accord id.* at 436. And a
10 state rule that applies across claims, regardless of their substance or origin, does not
11 define state-law “rights or remedies” but is procedural. *Id.*

12 **B. Federal, not state, law governs taxation of costs in federal court.**

13 By quoting Washington’s small-claims statute only partially, Emmons
14 inaccurately suggests (at 9)⁵ that the statute requires Washington courts to award
15 attorney fees, in their own right, to prevailing parties in actions pleading small
16 claims. In fact, the statute—housed in the Cost chapter of Washington’s Civil
17 Procedure title—addresses the taxation “of the costs of the action,” and includes
18 attorneys’ fees as part of those costs. RCW 4.84.250.

19 Just last year, the Ninth Circuit addressed the applicability in federal court of
20

⁵ All references to Emmons’s brief are to ECF No. 138.

1 a similar state cost taxation statute that turned on the amount in controversy. *Casun*
2 *Invest, A.G. v. Ponder*, 119 F.4th 637, 646–48 (9th Cir. 2024). *Casun* began by
3 observing that Rule 54(d)(1) controls the taxation of costs in federal court and did
4 so in a way that directly conflicted with Nevada law. *Id.* at 647. *Casun* then found
5 the Enabling Act inquiry inapplicable because the taxation of costs is provided by
6 federal statute, 28 U.S.C. § 1920, as well as a federal rule, and § 1920 is clearly
7 within Congress’s constitutional authority. *Id.* at 648.

8 Like Nevada’s cost statute, Washington’s small-claims statute is, on its terms,
9 a cost statute. It directly conflicts with 28 U.S.C. § 1920 because it authorizes
10 taxation of attorney fees as part of costs (in certain circumstances), whereas § 1920
11 does not. Under *Casun*, RCW 4.84.250 does not apply in federal court.

12 **C. Even disregarding the small-claims statute’s plain language**
13 **making it a cost statute and treating it as a pure fee statute, the**
14 **statute is procedural and inapplicable in federal court.**

15 The default rule, in both federal and Washington courts, is that each side pays
16 its own attorneys’ fees. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S.
17 240, 247–70 (1975); *AllianceOne Receivables Mgt., Inc. v. Lewis*, 180 Wn.2d 389,
18 394, 325 P.3d 904 (2014). That American Rule is subject to exception when
19 Congress or a state legislature enacts a statute requiring the losing party to pay the
20 prevailing party’s attorneys’ fees. *Alyeska*, 421 U.S. at 247; *AllianceOne*, 180 Wn.2d
at 394.

1 Often, when Congress or a state enacts a prevailing-party fee statute, it does
2 so as part of the remedies included in a substantive right of action. By so doing, the
3 state fee-shifting statute “embod[ies] a substantive policy” and helps define the
4 scope of the “statutory liability”—i.e., the remedy—attached to a “substantive
5 right.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 52 (1991). When a state takes that
6 approach and creates a statutory right to prevailing-party fees as a defined remedy
7 that runs with a substantive state right, the fee-shifting statute is deemed substantive
8 and ordinarily applies in a federal diversity action. *Alyeska*, 421 U.S. at 259 n. 31.

9 On the other hand, when a state legislature authorizes fees unattached to any
10 substantive right of action, instead incentivizing certain behavior generally in
11 litigation, the fee-shifting statute is deemed procedural and will not apply in federal
12 court. *See Chambers*, 501 U.S. at 52–53 (Rule 11 sanctions for bad-faith litigation
13 conduct, procedural); *Burlington N. R. Co. v. Woods*, 480 U.S. 1, 3–8 (1987) (state
14 statute that imposes mandatory 10% penalty on appellants who obtain stays of
15 judgment pending unsuccessful appeals, procedural); *In re TFT-LCD (Flat Panel)*
16 *Antitrust Litig.*, 637 Fed. Appx. 981, 985 (9th Cir. 2016) (unpublished) (state statute
17 providing for expert witness costs, procedural); *First Nat. Mortg. Co. v. Federal*
18 *Realty Inv. Trust*, 631 F.3d 1058, 1070–71 (9th Cir. 2011) (state offer-of-judgment
19 statute providing for expert witness fees, procedural); *Goldberg v. Pac. Indem. Co.*,
20 627 F.3d 752, 754–58 (9th Cir. 2010) (state offer-of-judgment rule, providing for

1 expert witness fees and double costs, procedural); *Langley v. Brown*, 204 Fed.
2 App’x, 597, 598 (9th Cir. 2006) (unpublished) (state statute providing fees for
3 “unjustified actions,” procedural); *In re Larry’s Apartment*, 249 F.3d 832, 837–39
4 (9th Cir. 2001) (state statute awarding fees for unjustified, harassing, delaying, or
5 abusive litigation, procedural); *Bass v. First Pac. Networks, Inc.*, 219 F.3d 1052,
6 1054–56 (9th Cir. 2000) (state statute providing fees to enforce supersedeas bond,
7 procedural); *Hinde v. Provident Life & Acc. Ins. Co.*, 112 F.3d 412, 413 (9th Cir.
8 1997) (state statute providing appellate fees without regarding which party
9 prevailed, procedural); *Aceves v. Allstate Ins. Co.*, 68 F.3d 1160, 1167 (9th Cir.
10 1995) (state offer-of-judgment rule, providing uncapped expert witness fees,
11 procedural); *Bell v. City of Kellogg*, 922 F.2d 1418, 1425 (9th Cir. 1991) (state
12 frivolous-litigation fee statute, procedural). *See also Banner Bank v. Smith*, 30 F.4th
13 1232, 1238–41 (10th Cir. 2022) (state bad-faith litigation statute, procedural);
14 *Stender v. Archstone-Smith Operating Tr.*, 958 F.3d 938, 941–47 (10th Cir. 2020)
15 (state cost statute, procedural); *Camacho v. Texas Workforce Comm’n*, 445 F.3d 407,
16 409–13 (5th Cir. 2006) (state declaratory judgment action, procedural); *Utica*
17 *Lloyd’s of Texas v. Mitchell*, 138 F.3d 208, 210 (5th Cir. 1998) (same).

18 The Ninth Circuit has not addressed whether RCW 4.84.250 is procedural or
19 substantive for Enabling Act purposes. Applying *Shady Grove* and its progeny cited
20 above, there can be no doubt, though, that the statute is procedural and inapplicable

1 in federal court. As noted, Justice Stevens’s controlling opinion focuses on two main
2 criteria in making this determination: (1) whether the state itself designates the
3 statute at issue as procedural; and (2) whether the state statute at issue is trans-
4 substantive (in which case it’s procedural) or tied to a specific substantive cause of
5 action. *Shady Grove*, 559 U.S. at 432, 436 (Stevens, J., concurring).

6 The Washington Legislature has designated the small-claims statute as
7 procedural by housing it within Title 4, which governs Civil Procedure. *Supra* at 4.
8 Washington courts agree, explaining the statute is designed to “promote settlement
9 and avoid trials” in cases involving small claims. *AllianceOne*, 180 Wn.2d at 395.
10 *Accord Crossroads Management, LLC v. Ridgway*, 2 Wn.3d 528, 547, 540 P.3d 82
11 (2023); *Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 788, 733 P.2d 960
12 (1987). Like Rule 11’s regulation of bad-faith litigation conduct, *Chambers*, 501
13 U.S. at 52–53, the small-claims statute’s focus on settlement-promotion trains its eye
14 on litigation conduct, not substantive rights or remedies.

15 And the small-claims statute is trans-substantive. Washington courts have
16 awarded fees under the statute across a wide variety of substantive claims. *See, e.g.*,
17 *Dobson v. Archibald*, 21 Wn. App.2d 91, 92, 99 n.3, 505 P.3d 115 (2022) (contract);
18 *Stonewood Design, Inc. v. Heritage Homes, Inc.*, 165 Wn. App. 720, 721–22, 725–
19 26, 269 P.3d 297 (2011) (statutory action to release lien bond); *Kalich v. Clark*, 152
20 Wn. App. 544, 547, 551–52, 215 P.3d 1049 (2009) (maintenance of shared

1 easement); *Frank Coluccio Constr. Co. v. King County*, 136 Wn. App. 751, 759–60,
2 780–81, 150 P.3d 1147 (2007) (tortious interference with economic interests,
3 Insurance Code, implied indemnity, promissory estoppel); *Lay v. Hass*, 112 Wn.
4 App. 818, 821–25, 51 P.3d 130 (2002) (quiet title); *Public Utilities Dist. 1 of Grays*
5 *Harbor County v. Crea*, 88 Wn. App. 390, 392, 397, 945 P.2d 722 (1997)
6 (negligence).

7 Under *Shady Grove*, Washington’s small-claims statute is thus clearly
8 procedural, leaving this Court with no Enabling Act problem in following the
9 American Rule that each party pays its own fees.

10 **D. Under an unguided *Erie* analysis, the Court still should not apply**
11 **Washington’s small-claims statute here because doing so would**
inequitably administer the law and promote forum shopping.

12 Emmons was able to remove this action to federal court only because he—an
13 Oregonian—crossed the Columbia River when he circulated flyers within
14 Washington spreading falsehoods against Guenther. Had Emmons been a
15 Washingtonian, he would have been unable to remove the case, which would have
16 remained in Washington superior court. In those circumstances, Guenther would
17 have had an absolute right to voluntarily dismiss her claims before trial, CR
18 41(a)(1)(B), as she tried to do here. And she could have done so without liability
19 under Washington’s small claims statute for Emmons’s fees because the Washington
20 Supreme Court has squarely held that a defendant is not a prevailing party under that

1 statute when a plaintiff voluntarily dismisses. *AllianceOne*, 180 Wn.2d at 393–99.
2 *See also Emp. Painters’ Tr. Health & Welfare Plan v. Sherman*, No. C13-687 TSZ,
3 2014 WL 2862965, at *1 (W.D. Wash. June 24, 2014).

4 Awarding Emmons, an Oregonian, fees under a Washington statute that
5 would clearly bar him from obtaining fees had he been a Washingtonian would
6 inequitably administer Washington law, and promote forum shopping, in precisely
7 the manner that *Erie* and its progeny decry.

8 **E. No controlling authority requires otherwise.**

9 Emmons cites (at 9) two decisions in support for his contention that the small-
10 claims statute applies in federal court, *Kona Enters., Inc. v. Estate of Bishop*, 229
11 F.3d 887, 883 (9th Cir. 2000) and *LaRoche v. Smith*, 2016 WL 1365951 (W.D.
12 Wash. Apr. 5, 2016). Neither establishes the point.

13 *Kona* involved a Hawaiian statute providing for prevailing-party fees “in all
14 actions in the nature of assumpsit.” *Id.* at 883–84 (citing Haw. Rev. Stat. § 607-14).
15 Assumpsit is a common law action for damages for non-performance of contract. *Id.*
16 at 884. The Hawaiian statute is thus a classic substantive fee-shifter that ties the right
17 to fees to the substance of the claim. *Id.* (explaining that the statute focuses on the
18 “‘substance’” of the action).

19 In *LaRoche*, the district court entered summary judgment for the defendants
20 on their counterclaim and, toward the end of its decision, indicated that “[a]fter

1 judgment is entered, Waid and Creager may tax costs in the manner set forth in
2 Local Civil Rule 54(d), and may move within the time specified in Rule 54(d)(2) for
3 attorney's fees pursuant to RCW 4.84.250 relating solely to their counterclaim."
4 *LaRoche v. Smith*, C15-1003 TSZ, 2016 WL 1365951, at *6. Judge Zilly's prediction
5 at the end of *LaRoche* about subsequent steps in that litigation does not address the
6 applicability of the small-claims statute in federal court under *Erie* or its progeny.
7 While we have great respect for Judge Zilly and the district court judges throughout
8 Washington, his prediction is neither binding nor persuasive here, as he offers no
9 analysis in support of the statute's applicability.

10 The Ninth Circuit has not addressed the question, but other district courts that
11 have considered the applicability of the small-claims statute in federal court have
12 concluded it does not apply. *See, e.g., Castillo v. Frito-Lay, Inc.*, No. C05-5209RJB,
13 2006 WL 1518868, at *1 (W.D. Wash. May 26, 2006) ("a federal court hearing a
14 case on a federal question is not bound by a state procedural rule such as RCW
15 4.84.250.").

16 In full candor to the Court, some district judges (including this Court), have
17 applied the small-claims statutes in federal actions. *See, e.g., Elf-Man, LLC v.*
18
19
20

1 *Lamberson*, 2015 WL 11112498, *1 (E.D. Wash. Jan. 9, 2015).⁶ Those decisions,
2 however, did not address the *Erie* questions that preclude federal courts from
3 applying in federal court procedural prevailing-party fee statutes, like Washington’s
4 small-claims statute. Respectfully, they are not persuasive authority here.

5 **III. The Court should award no more than \$ 18,147.39 in costs.**

6 Emmons seeks (at 1, 18) \$53,735.22 in costs. But he is entitled under 28
7 U.S.C. § 1920 to no more than \$18,147.39 in taxable costs.

8 Emmons admits (at 16–18) that \$11,354.58 of the costs he seeks are expenses
9 that are not taxable under 28 U.S.C. § 1920, recoverable only as fees. Because
10 Emmons is not entitled to fees, Parts I–II, *supra*, the Court has no authority to award
11 these non-taxable expenses. Of the remaining amount Emmons seeks, three
12 categories of expenses are not taxable: *pro hac vice* fees, the expenses of videotaping
13 transcribed depositions, and litigation-support services.

14
15 ⁶ Some decisions, such as *Carpenters Health & Sec. Tr. of W. Washington v.*
16 *Paramount Scaffold*, No. 12-1252-RSM, 2013 WL 12237750 (W.D. Wash. Sept. 25,
17 2013), involve fees under Washington’s public works contract statute, RCW
18 39.04.240, which incorporates the provisions of RCW 4.84.250–280. Unlike a
19 generic RCW 4.84.250 claim, fees under the public works contract statute are tied
20 to a substantive cause of action and would thus require a different analysis.

1 **Pro Hac Vice:** Fees for *pro hac vice* admission are not “[f]ees of the clerk”
2 taxable under 28 U.S.C. § 1920(1). *Kalitta Air L.L.C. v. Cent. Texas Airborne Sys.*
3 *Inc.*, 741 F.3d 955, 957 (9th Cir. 2013). Of the \$1,080 Emmons seeks in filing fees,
4 \$678 is for non-taxable *pro hac vice* fees. ECF 139-5 at 131 (8/24/22, 6/7/23 entries).

5 **Video Depositions:** Emmons asks this Court to tax \$11,998 in costs for
6 videotaping seven depositions that he also had transcribed stenographically. ECF
7 No. 139-5 at 131, 134 (depositions of Jackson, Fish, Garcia, Guenther, Emmons,
8 Selvaggio, Anderson). These expenses are not the “relatively minor, incidental
9 expense[]” specified by the statute. *Taniguchi*, 566 U.S. at 573. Under Section
10 1920(2), fees associated with transcripts must be “necessarily obtained for use in the
11 case[.]” Courts do not presume necessity, and Emmons has not established it here.
12 *Master Objects, Inc. v. Meta Platforms, Inc.*, No. C21-05428-WHA, 2023 WL
13 149997, at *1 (N.D. Cal. Jan. 20, 2023) (cost to videotape a deposition was not
14 taxable when the videos were not used to resolve any discovery disputes); *Frlekin v.*
15 *Apple Inc.*, No. C13-03451-WHA, 2016 WL 354862, at *2 (N.D. Cal. Jan. 25, 2016)
16 (same); *Genuine Enabling Tech. LLC v. Nintendo Co.*, No. C19-00351-RSM, 2021
17 WL 211536, at *3 (W.D. Wash. Jan. 21, 2021) (cost to videotape a deposition was
18 taxable only because the witnesses were outside the court’s subpoena power and
19 would not be available for trial). Here, the videos were not used to resolve any
20 discovery disputes or for any trial preparation that could not have been accomplished

1 through use of transcripts alone. The \$11,998 in costs of videotaping already-
2 transcribed transcripts is thus not taxable under Section 1920.

3 **3. Litigation Support:** Finally, Emmons seeks \$11,557.25 for litigation support
4 services, including editing load files, loading data into “Workspace” (Emmons’s
5 document review platform), transferring and processing data, fees for external use
6 of the document-review platform, technical assistance with the platform, data
7 hosting, and similar expenses. ECF No. 139-5 at 131–37.

8 The Ninth Circuit, however, has held that not all electronic discovery costs
9 are taxable. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 914, 925 (9th Cir.
10 2015). Instead, § 1920(4), which authorizes taxation of costs for “making copies of
11 any materials where the copies are necessarily obtained for use in the case,” covers
12 only the costs of optical character recognition, converting documents to an image
13 file (such as TIFF), and endorsing a document (i.e., Bates-stamping it). *Id.* at 928–
14 32. Specifically, § 1920(4) does not authorize taxation of costs for uploading data,
15 data hosting, user fees to access document review platforms, or other litigation-
16 support services beyond OCR, imaging, and endorsing. *Id.* at 929–32. Indeed, the
17 “circumstances in which a copy will be deemed ‘necessarily obtained’ for use in a
18 case will be extremely limited.” *Id.* at 930. None of the items Emmons seeks as
19 litigation support services are limited to OCR, imaging, or endorsing documents.
20 They are not taxable. *Id.*

CONCLUSION

Without apparent irony, Emmons accuses Guenther (at 1) of increasing litigation costs by prolonging this litigation. In fact, for nearly a year now, Guenther has done everything within her power to end or narrow this litigation. *See* ECF No. 39, 95, 104. Emmons, by contrast, has prolonged this litigation in the hopes of attaining a seven-figure fee award, even though his own litigation behavior—prematurely filing Guenther’s settlement offer—precludes him from doing so and he could never obtain fees under a Washington statute inapplicable in federal court.

At this stage of the proceedings, notwithstanding Guenther’s pending appeal, Emmons is a prevailing party entitled to taxable costs. Only \$18,147.39 of the \$53,735.22 he seeks in costs are taxable. He has no right to the remainder of the costs he seeks or to any fees. The Court should therefore deny his motion, except as to the \$18,147.39 in properly taxable costs.

RESPECTFULLY SUBMITTED this 17th day of March, 2025.

s/Darin M. Dalmat

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DECLARATION OF SERVICE

I hereby certify that on the date noted below, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

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DATED this 17th day of March, 2025 at Bonney Lake, Washington.

By: 
Elinor Engle, Paralegal